Supreme Court, U.S.
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No. 98-1321

In The

Supreme Court of the United States

October Term, 1998

SALEK E. BEIM, et al.,

Petitioners,

v.

JAY ALIX, Trustee,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should petitioners be granted certiorari where they do not claim any error of law occurred below, where petitioners merely disagree with the Bankruptcy Court's findings of fact, and where those findings were affirmed by the District Court and by the Court of Appeals?

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STATEMENT OF THE CASE

The facts crucial to the appeal were summarized by the Court of Appeals in its opinion affirming the opinions of the Bankruptcy Court and of the District Court:

> "Prior to 1986, Defendants-Appellants Sanders and Kreissl had become the controlling shareholders of Debtor and concluded that a public offering was necessary to provide Debtor with needed capital. Each of them obtained a personal loan from Appellant Wertheimer for $65,000 on July 17, 1986 ("Loan I"). They signed promissory notes memorializing the repayment terms of Loan I and obligating themselves to pay back the $130,000 total within 181 days from the date signed.
>
> "Sanders and Kreissl used the proceeds to fund the purchase of stock in their name, in Tamarac, a publicly traded company. Thereafter, Sanders and Kreissl along with other shareholders of Debtor, exchanged their shares of Debtor for shares of Tamarac. Thus, Sander, Kreissl and the other shareholders became owners of the controlling interest in the share of Tamarac and Tamarac owned all shares of the Debtor. In 1986, Tamarac was renamed Sanders Confectionery Products, Inc. ("Sanders Confectionery").
>
> "Shortly after the formation of Sanders Confectionery, the company embarked on a public offering of about one-third of its stock in order to obtain the needed operating capital for the Debtor. However, the proceeds of that public offering were required to be held in escrow until

certain conditions were met. The Debtor needed capital in the meantime.

"In an effort to secure interim capital, Defendant Beim arranged for various investors, including Defendant Wertheimer to loan a total of $300,000 ("Loan II") to Sanders Confectionery, the corporate parent of Debtor. This loan was made on or about January 22, 1987, and the money obtained by Sanders Confectionery was given to and used by the Debtor.

"About one month after obtaining Loan II, $4.3 million in net proceeds from the public offering were released to Sanders Confectionery which immediately transferred the funds to the Debtor as a capital contribution. The money was used by Debtor to pay various overdue tax obligations as well as the following transfers at issue in this litigation:

> "(1) On January 21, 1987, Debtor paid a roll-over fee of $7,500 to Defendant Beim for $130,000 in personal loans to Defendants Sanders and Kreissl (Loan I).
>
> "(2) On April 16, 1987, Debtor paid the entire $130,000 principal of the personal loan of Defendants Sanders and Kreissl (Loan I).
>
> "(3) On January 27, 1987, Debtor paid Defendant Beim $18,000 in finder's fees in exchange for the $300,000 loan (Loan II) to Sanders Confectionery.
>
> "(4) Thereafter, Debtor paid $56,000 in interest and extension fees on Loan II to Defendants Beim, Wertheimer, and Yesod.

> "Debtor filed bankruptcy on November 16, 1987. On November 30, 1989, Trustee Jay Alix instituted proceedings to recover the transfers made with respect to Loans I and II on the theory that the transfers were fraudulent conveyances, or in the alternative, voidable preferences."

(Appendix to Petition, pp. 2a to 4a) (footnotes omitted).

REASONS TO DENY THE WRIT

I. Petitioners do not challenge the legal bases of the decisions of the lower courts.

A review of the petition shows that, although Petitioners disagree with the Bankruptcy Court's factual determination that the Debtor was insolvent on the dates of the transactions at issue in this matter, Petitioners do not claim that the courts below made any error of controlling federal law.

The petitioners have mischaracterized the rulings on that issue by the courts below. The Bankruptcy Court, after receiving testimony and documentary evidence, determined that the Trustee's evidence was more credible than Petitioners' evidence and that the Trustee had proved that the Debtor was insolvent on the dates of the transfers (Appendix to Petition, pp. 56a-57a). On appeal, the District Court (*Id.*, p. 28a) and the Court of Appeals (*Id.*, pp. 6a-7a) both affirmed the Bankruptcy Court's ruling on solvency as a determination of fact that was not clearly erroneous.

Petitioners litigated and lost the issue of insolvency in the Bankruptcy Court. Petitioners raised that issue on appeal to the District Court and then to the Court of Appeals. Petitioners were unsuccessful in both courts. There is no reason why the Supreme Court should afford petitioners a fourth opportunity to debate whether Debtor was insolvent on the relevant dates.

Therefore, the Court should deny the petition for writ of certiorari in this case.

II. The petition for certiorari contains many untrue assertions.

The petition for writ of certiorari includes many statements that are patently false. For example:

1. Petitioners Kreissl and Sanders did not merely guarantee the loans in question. Those loans were made to Messrs. Kreissl and Sanders as *primary* obligors, although the lenders were repaid with assets of the Debtor (*Id.*, pp. 13a-14a).

2. The Bankruptcy Court did not "base its determination of insolvency at the time of the transfers . . . upon the financial condition of the Debtor in May 1988. . . ." To the contrary, as the Bankruptcy Court noted in its decision, the Trustee presented convincing evidence that the Debtor was insolvent on the date of each transfer (*Id.*, pp. 47a-49a).

III. Relief Requested.

Respondent respectfully prays that this Honorable Court: (a) affirm the decisions below granting respondent judgment against petitioners; and (b) deny the Petition for Writ of Certiorari.

Respectfully submitted,

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